1117

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 249.

CYRUS A. BROWN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

FILED FEBRUARY 26, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 595.

CYRUS A. BROWN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

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1 Form No. 307.

TRANSCRIPT OF PROCEEDINGS.

UNITED STATES COURT,
Indian Territory, Northern District, ss:

At a stated term of the United States court in the Indian Territory, northern district, begun and held in the court rooms at Muskogee, in the Indian Territory, on the 1st day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Present, the Hon. William M. Springer, judge of said court.

On the 1st day of December, 1896, being a regular day of said term of said court, among the proceedings had were the following, to wit:

Be it remembered that on the 1st day of December, A. D. 1896, the United States court for the northern district, Indian Territory, met in regular session at Muskogee, Indian Territory. Present: Hon. Wm. M. Springer, judge; James A. Winston, clerk; Samuel M. Rutherford, marshal, and Clifford L. Jackson, attorney.

Now comes the marshal of this court and returns into court the names of the persons summoned by him according to law to serve as grand jurors for this term of court, as follows: J. W. Patrick, Orange Fuller, Wm. L. Moore, W. C. Trent, Frank Vore, S. Barbee, George W. Green, John Marks, Connell Rogers, C. E. Foley, A. W. Robb, Wm. Beck, Sam T. Davis, Bluford Miller, C. L. Lacy, and W. A. Halsell; and for alternates the names of C. W. Phillips, E. N. Ratcliff, Fred Parkinson, R. Lee Comer, W. J. Lipscomb, and T. A. Parkinson. They are each severally called, and all answer to their names excepting C. W.
2 Phillips, E. N. Ratcliff, R. Lee Comer, C. L. Lacy, and W. A. Halsell. The following are from good cause excused from service: W. L. Moore, W. J. Lipscomb, leaving only fifteen persons of the panel. The court orders the marshal to summon one other person from the body of the district and not from bystanders to complete the panel of the grand jury. The marshal summons J. C. Banks, who now appears in open court, and is found qualified. The grand jury now being complete, as follows: J. W. Patrick, Orange Fuller, Fred Parkinson, W. C. Trent, Frank Vore, S. Barbee, George W. Green, John Marks, Connell Rogers, T. A. Parkinson, C. E. Foley, A. W. Robb, Wm. Beck, Sam T. Davis, Bluford Miller, and J. C. Banks, who are each found possessing the necessary qualification of grand jurors, and said grand jurors are now instructed as to their duties and are sworn as the law directs, and A. W. Robb is appointed foreman of said grand jury and they retire in charge of a sworn officer to consider of their presentments.

Thereafterward, on the 5th day of December, A. D. 1896, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

It is ordered by the court that Orange Fuller, John Marks, and C. E. Foley be, and they are hereby, excused from further duty as grand jurors at this term of court, and the marshal is ordered to summon three other

persons from the body of the district, and not from bystanders, to act as grand jurors and to report Monday morning at nine o'clock.

Thereafterwards, on the 7th day of December, 1896, the same being one of the regular days of said term of said court, among the pro-
3 ceedings had, *the proceedings had*, was the following, to wit:

The marshal returns into open court the names of W. J. Birk, F. McElsey, and Thomas Foster, who were summoned by him to complete the panel of the grand jury, made vacant Saturday by the excuse of Orange Fuller, John Marks, and C. E. Foley. Said persons appear in open court and are each found to be qualified, and they, together with the remainder of the grand jury not excused, are duly sworn by the court and charged touching their duties. A. W. Robb is appointed foreman of said grand jury, and they retire in charge of their sworn officer to continue their deliberations.

Thereafterwards, on the 8th day of December, 1896, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

It is ordered by the court that Connell Rogers be, and he is hereby, excused from further duty as a grand juror at this term of court. And the marshal is ordered to summon one person from the outside of the court room to serve at once as a grand juror. The marshal returns the name of Wm. Owen, who was summoned by him to complete the panel of the grand jury, made vacant by the excuse of Connell Rogers. Said person appears in open court and is found qualified, and he, together with the remainder of the grand jury not excused, are duly sworn by the court and charged touching their duties. A. W. Robb is appointed foreman of said grand jury, and they retire in charge of a sworn officer to continue their deliberations.

Thereafterwards, on the 10th day of December, A. D. 1896, the same being one of the regular days of said term of said court,
4 among the proceedings had was the following, to wit:

Now comes the grand jury into open court in charge of their sworn officer, and each of said grand jurors is severally called and all answered to their names. And through their foreman, in the presence of the grand jury, said grand jury presents to the court the following indictment, amongst others, which said indictment was ordered filed in open court in the presence of the grand jury by the clerk of this court, which was done, and which said indictment is endorsed as follows: Criminal docket, No. 3875. In the United States court in the Indian Territory, northern district. United States vs. Johnson L. Morgan and Cyrus A. Brown. Indictment for murder. A true bill. A. W. Robb, foreman of the grand jury. Filed in open court Dec. 10, 1896. Jas. A. Winston, clerk.

The grand jury, reporting that they have further business before them, retire in charge of their sworn officer to further deliberate, and it is ordered that said defendants be remanded to the custody of the marshal.

5

Form 150.

Indictment for murder in the Indian Territory.

(U. S. attorney's office, No. .) (Grand Jury No. .) Court No., 3875.

UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

In the United States court in the Indian Territory for the northern district of said Territory, at the December term, A. D. 1896.

UNITED STATES *versus* JOHNSON L. MORGAN AND CYRUS A. BROWN, defendants.	Indictment for murder.

The grand jurors of the United States of America, duly selected, summoned, impaneled, sworn, and charged to inquire within and for the body of the northern district of the Indian Territory aforesaid, in the name and by the authority of the United States, upon their oaths do find, present, and charge that one Johnson L. Morgan and one Cyrus A. Brown, who were not then and there members of any Indian nation, on the 6th day of October, A. D. 1896, within the northern district of the Indian Territory aforesaid, with force and arms, in and upon the body of one Daniel Cutbert, then and there being, feloniously, wilfully, and of their malice aforethought did make an assault; and that the said Johnson L. Morgan and Cyrus A. Brown two certain guns then and there charged with gunpowder and two leaden bullets, which said guns they, the said Johnson L. Morgan and Cyrus A. Brown, in their hands then and there had and held, then and there feloniously, wilfully, and of their
6 malice aforethought did discharge and shoot off at, to, against, and upon the body of the said Daniel Cuthbert, and that the said Johnson L. Morgan and Cyrus A. Brown, with the leaden bullets aforesaid, out of the guns aforesaid, then and there, by force of the gunpowder aforesaid by the said Johnson L. Morgan and Cyrus A. Brown discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their malice aforethought did strike, penetrate, and wound him, the said Daniel Cutbert, in and upon the left side of the back of him, the said Daniel Cutbert, giving to him, the said Daniel Cutbert, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the guns aforesaid by the said Johnson L. Morgan and Cyrus A. Brown in and upon the left side of the back of him, the said Daniel Cutbert, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Daniel Cutbert, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that upon the day and year aforesaid and at the place aforesaid the said Johnson L. Morgan and Cyrus A. Brown him, the said Daniel Cutbert, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder the

said Daniel Cutbert, not being then and there a member of any Indian nation, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Verdict:

We, the jury, find the defendant guilty of , as charged in the above count in the within indictment.

Foreman.

7 Verdict:

We, the jury, find the defendant not guilty as charged in the above count in the within indictment.

Foreman.

And the grand jurors aforesaid, upon their oaths aforesaid, do further find, present, and charge that the said Johnson L. Morgan and Cyrus A. Brown, who were not then and there members of any Indian nation, on the 6th day of October, A. D. 1896, within the northern district of the Indian Territory aforesaid, with force and arms, in and upon the body of the said Daniel Cutbert, then and there being, feloniously, wilfully, and of their malice aforethought did make an assault; and that the said Johnson L. Morgan and Cyrus A. Brown two certain pistols then and charged with gunpowder and two leaden bullets, which said pistols they, the said Johnson L. Morgan and Cyrus A. Brown, in their hands then and there had and held, then and there feloniously, wilfully, and of their malice aforethought did discharge and shoot off at, to, against, and upon the body of the said Daniel Cutbert, and that the said Johnson L. Morgan and Cyrus A. Brown, with the leaden bullets aforesaid, out of the pistols aforesaid, then and there, by force of the gunpowder aforesaid by the said Johnson L. Morgan and Cyrus A. Brown discharged and shot off as aforesaid, then and there feloniously, wilfully, and of their malice aforethought did strike, penetrate, and wound him, the said Daniel Cutbert, in and upon the left side of the back of him, the said Daniel Cutbert, giving to him, the said Daniel Cutbert, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out
8 of the pistols aforesaid by the said Johnson L. Morgan and Cyrus A. Brown, in and upon the left side of the back of him, the said Daniel Cutbert, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said Daniel Cutbert, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that upon the day and year aforesaid and at the place aforesaid the said Johnson L. Morgan and Cyrus A. Brown him, the said Daniel in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder the said Daniel Cutbert, not being then and there a member of any Indian nation, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

JAMES M. GIVENS,

Assistant United States Attorney Northern District of Indian Territory.

Verdict:

We, the jury, find the defendant guilty of as charged in the within indictment.

Foreman.

Verdict:

We, the jury, find the defendant not guilty as charged in the within indictment.

Foreman.

(Indorsed:) Criminal Docket No. 3875; in the United States court in the Indian Territory, northern district; United States vs. Johnson L. Morgan and Cyrus A. Brown; indictment for murder; a true
9 bill. A. W. Robb, foreman of the grand jury. Filed in open court Dec. 10, 1896. Jas. A. Winston, clerk.

Witnesses for the United States: A. L. Rowell, B. F. Hubbard, Thos. E. Ledbetter, Hartley, F. M., Campbell; Sam Adair; J. L. Brown; Joel Hartley; Jno. Smith; Samuel C. Minnick, Falls City, Neb.

Witnesses.

Names.	Post office address.
A. L. Rowell	Campbell, I. T.
Ben F. Hubbard	Do.
Thos. E. Ledbetter	Do.
F. M. Hartley	Do.
Sam Adair	Vian, I. T.
J. L. Brown	Do.
Joel Hartley	McKey, I. T.
Jno. Smith	Campbell, I. T.
Samuel C. Minnick	Falls City, Neb.

10 Thereafterwards, on the 11th day of December, A. D. 1896, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

UNITED STATES *vs.* JOHNSON L. MORGAN AND CYRUS A. BROWN. } No. 3875. Indictment for murder.

J. H. Koogler, esq., a regular practicing attorney, is hereby appointed attorney for the defendants herein.

11 Form No. 307.

TRANSCRIPT OF PROCEEDINGS.

UNITED STATES COURT,

Indian Territory, Northern District, ss:

At a stated term of the United States court in the Indian Territory, northern district, begun and had in the court rooms at Muskogee, in the Indian Territory, on the 4th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Hon. Wm. M. Springer, judge of said court.

On the 4th day of May, 1897, being a regular day of said term of said court, among the proceedings had were the following, to wit:

Be it remembered that the United States court in the Indian Territory, northern district, met in regular session at the court rooms at Muskogee, Indian Territory, on the 4th day of May, A. D. 1897, present: Hon. Wm. M. Springer, judge; James A. Winston, clerk; Samuel M. Rutherford, marshal, and Pliny L. Sopher, attorney. Court having been opened in due form of law, the following proceedings were had, to wit:

On the 15th day of July, A. D. 1897, the same being one of the regular days of said term of said court, court met, present: Hon. John R. Thomas, judge of the United States courts in the Indian Territory, and the following, among other proceedings, were had, to wit:

THE UNITED STATES, *vs.* JOHNSON L. MORGAN AND CYRUS A. BROWN. } No. 3875. Indictment for murder.

12 Comes now the United States by the district attorney, and the defendants also come, each in his proper person and attended by counsel, and on motion of the district attorney this case is dismissed without prejudice as to the defendant, Johnson L. Morgan.

Thereafterwards, on the 16th day of July, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES, *vs.* CYRUS A. BROWN. } No. 3875. Indictment for murder.

On this day come the United States by the district attorney, and come the said defendant, Cyrus A. Brown, in his proper person, in custody of the marshal, and attended by counsel, and it appearing from the return of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this case, together with their post-office addresses; and that he has also been served with a full and complete list of the panel of the petit jury for this term of court, together with their post-office addresses, more than two entire days heretofore, and the said defendant now being duly arraigned for plea, says that he is not guilty as charged in the indictment, and puts himself upon the country; whereupon it is ordered that a jury come to try the issue joined; whereupon, after challenge by both plaintiff and defendant, the following were selected for the trial of this cause, to wit: Heck Robbins, B. J. Vaughan, J. M. Hutchison, Wm. E. Whitsett, A. H. Berry, A. J. Howard, John E. Newberry, James L. Brown, W. H. Brown, W. B. Dur-

13 ham, J. B. Muhler, and Harry Menzemer, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing a sta'ement of the case, and some evidence, and there not being time to further progress in the trial of this cause, the jury were put in charge of a sworn bailiff of this court. And

it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

Thereafterwards, on the 17th day of July, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

On this day come the United States by the district attorney, and comes the said defendant in custody of the marshal, and by his attorneys, and now come the jury heretofore empaneled herein, in charge of a sworn bailiff of this court, viz: Heck Robbins, B. J. Vaughan, J. M. Hutchinson, Wm. E. Whitsett, A. H. Berry, A. J. Howard, John E. Newberry, James L. Brown, W. H. Brown, W. B. Durham, J. B. Muhler, and Harry Menzemer, who took their seats in the jury box, and after hearing the remainder of the evidence and the argument of counsel and receiving the instructions of the court, retired in charge of the sworn bailiff aforesaid, to consider of their verdict, and after some time returned into court in charge of the sworn bailiff aforesaid, and presented the following verdict, to wit:

14 "We, the jury, find the defendant, Cyrus A. Brown, guilty of murder as charged in the second count of the within indictment. (Signed) J. E. Newberry, foreman." Whereupon the jury was by the court discharged from the further consideration of this case, and the said defendant remanded to the custody of the marshal to await final sentence.

Thereafterwards, on the 20th day of July, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

Comes the United States by the district attorney, and the said defendant, Cyrus A. Brown, also comes, in custody of the marshal, and attended by counsel, and said defendant, by his attorneys, files his motion to set aside the verdict of the jury and for a new trial in this cause.

Thereafterwards, on the 10th day of September, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

Comes the United States by the district attorney, and the defendant also comes in custody of the marshal and attended by counsel, and
15 the motion for a new trial herein comes on to be heard, the court being fully advised in the premises, sustains said motion. It is

therefore ordered that the verdict heretofore rendered by the jury in this cause be, and the same is, set aside and a new trial granted in this cause. It is further ordered that said defendant be remanded to the custody of the marshal of this court.

UNITED STATES COURT,
Indian Territory, Northern District, ss:

At a stated term of the United States court, in the Indian Territory, northern district, begun and had in the court rooms at Muskogee, in the Indian Territory, on the 6th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present, the Hon. John R. Thomas, judge of said court.

On the 6th day of December, 1897, being a regular day of said term of said court, among the proceedings had were the following, to wit:

Be it remembered that the United States court for the northern district of the Indian Territory, met in regular session at the court rooms at Muskogee, Indian Territory, on the 6th day of December, 1897, present, Hon. John R. Thomas, judge of the United States courts in the Indian Territory, Leo E. Bennett, marshal, Pliny L. Soper, attorney, and James A. Winston, clerk. Court having been opened in due form of law, the following proceedings were had, to wit:

The marshal returns into court the names of the persons summoned by him according to law to serve as petit jurors for this
16 present, December, 1897, term of court, and they are each severally called, and the following answer to their names: E. C. Julian, Lewis Lyons, Lewis N. B. Jobe, Lewis Miller, J. W. Graham, Ferdinand Farmer, Percy Hicks, D. N. Scott, David Dickson, W. J. McMakin, sr., R. M. Bean, J. W. Thompson, W. W. Brinks, Alvin Hodge, H. C. Hicks, T. A. Manwarring, F. P. Wells, David Berryhill, Joseph W. Bridges, Joseph Downing, Scott Gentry, and Charles Winfield, who are each examined by the court touching their qualifications, and are found possessing all the qualifications required by law, and said jury is duly sworn for the term and give their attendance, and the marshal is ordered to summon and return into court on to-morrow morning the names of eight other persons to complete the panel of the petit jury.

Thereafterwards, on the same day, December 6th, 1897, the following further proceedings were had, to wit:

For cause shown it is ordered that H. C. Hicks be and he is excused from further service as a petit juror at this term of court, and the marshal is ordered to summon one other person to fill the vacancy thus occassioned, said person to be and appear in court on to-morrow morning at nine o'clock.

Thereafterwards, on the 7th day of December, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, among the proceedings had was the following, to wit:

The marshal returns into court the names of the persons summoned by him to complete the panel of the petit jury, to wit: James
17 Curtis, H. C. Lowery, R. N. Julian, E. R. Rulison, Elton Brazel, Walter Payne, J. P. Stringfield, E. Putnam, and J. C. McKenzie, who were each called and all answered to their name, and are exam-

ined by the court touching their qualifications, and are each found possessing all the qualifications required by law, and said jurors are each accepted as petit jurors for this term of court, and are sworn for the term and give their attendance.

Thereafterwards, on the 15th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES)
vs. No. 3875. Indictment for murder.
CYRUS A. BROWN.)

Comes the United States by the district attorney, and the defendant also comes, in the custody of the marshal and attended by counsel, and the said defendant files a motion for continuance herein, which said motion coming on to be heard is by the court overruled. It is ordered that an attachment issue for witness Ed. Sweeny, directed to the marshal for the district of Kansas, returnable forthwith.

Thereafterwards, on the 16th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, among the proceedings had was the following, to wit:

THE UNITED STATES)
vs. No. 3875. Indictment for murder.
CYRUS A. BROWN.)

18 On this day come the United States by the district attorney, and comes the said defendant, Cyrus A. Brown, in custody of the marshal and attended by counsel, and it appearing from the return of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this case, together with their post-office addresses, and that he has also been served with a full and complete list of the panel of the petit jury for this term of court, together with their post-office addresses, more than two entire days heretofore; and the said defendant having been heretofore duly and legally arraigned, and having entered his plea that he is not guilty as charged in the indictment, he puts himself upon the country, whereupon it is ordered that a jury come to try the issue joined. Whereupon, after challenge by both plaintiff and defendant, the following were selected for the trial of this case, viz: Lewis Lyons, J. W. Thompson, Joseph Downing, R. M. Bean, J. W. Graham, David Berryhill, F. A. Manwarring, Ferdinand Farmer, F. P. Wells, W. J. McMakin, sr., Charles Winfield, and Lewis Miller, twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing the statement of the case and some of the evidence, and there not being time to further progress in the trial of this cause they were put in charge of a sworn bailiff of the court. And it is further ordered by the court that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge and return them again into court at the meeting thereof to-morrow morning at nine o'clock.

19 Thereafterwards, on the 17th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On this day come the United States by the district attorney, and the defendant, Cyrus A. Brown, also comes in custody of the marshal and attended by counsel, and also comes the jury heretofore empaneled for the trial of this case, viz: Lewis Lyons, J. W Thompson, Joseph Downing, R. M. Bean, J. W. Graham, David Berryhill, T. A. Manwarring, Ferdinand Farmer, F. P. Wells, W. J. McMakin, sr., Charles Winfield, and Lewis Miller, who took their seats in the jury box, and after hearing the remainder of the evidence and the argument of counsel and the instructions of the court, retired in charge of the sworn bailiff aforesaid to consider of their verdict, and after due deliberation returned into open court in charge of their sworn bailiff aforesaid, and returned the following verdict, to wit: "We, the jury, duly empaneled and sworn in the above-entitled cause, do find, from the law and the evidence, the said defendant, Cyrus A. Brown, guilty of murder as charged in the first count of the within indictment. (Signed) John W. Graham, foreman." Upon the request of the attorneys for the said defendant, the said jury was polled, and each one answering that this was his verdict, and that he was satisfied therewith, the said jury was discharged by the court from the further consideration of this case, and the said defendant was remanded to the custody of the marshal to await final sentence.

20 Thereafterwards, on the 20th day of December, 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On this day comes the United States by the district attorney, and the said defendant also comes in custody of the marshal and attended by counsel, and said defendant, by his attorneys, files motion to set aside the verdict of the jury herein and for a new trial in this cause.

Thereafterwards, on the 24th day of December, A. D. 1897, the same being one of the regular days of said term of said court, present, Hon. John R. Thomas, judge, the following among other proceedings were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On this day come the United States, by the district attorney, and the said defendant also comes in custody of the marshal and attended by counsel, and the motion to set aside the verdict of the jury and for a

new trial herein, heretofore filed, comes on to be heard, and the court, being fully advised in the premises, does overrule the same, to which ruling of the court the said defendant, by his attorneys, duly excepted. And thereupon the said defendant files motion in arrest of judgment herein, which said motion coming on to be heard and the court being fully advised, the same is by the court overruled, to which action
21 of the court in overruling said motion the defendant, by his attorneys, duly excepted at the time.

Thereafterwards, on the same day, being the 24th day of December, A. D. 1897, the following further proceedings, amongst others, were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On motion of Pliny L. Soper, esq., attorney for the northern district of the Indian Territory, the said defendant, Cyrus A. Brown, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 17th day of December, A. D. 1897, should not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said Cyrus A. Brown be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Cyrus A. Brown to be taken hence, and him, the said Cyrus A. Brown, safely and securely keep from the date hereof until the 25th day of February, A. D. 1898, and on that day, between the rising and the setting of the sun of said day, the said marshal cause the said Cyrus A. Brown to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said rising and setting of the sun on the said 25th day of
22 February, A. D. 1898, cause the said Cyrus A. Brown to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefore; and the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

Thereafterwards, on the same day, being the 24th day of December, A. D. 1897, the following further proceedings, amongst others, were had, to wit:

THE UNITED STATES }
vs. } No. 3875. Indictment for murder.
CYRUS A. BROWN. }

On motion of the defendant, said defendant is granted sixty days from this date in which to prepare and file his bill of exceptions. Defendant,

on cause shown, is also granted sixty days from this date in which to file petition for writ of error.

23 Thereafterwards, on the 20th day of January, A. D. 1898, the same being one of the regular days of said December, 1897, term of said court, present, Hon. Wm. M. Springer, judge, among the proceedings had was the following, to wit:

THE UNITED STATES)
vs.) No. 3875. Indictment for murder.
CYRUS A. BROWN.)

On this day comes the defendant, by his counsel, and files his bill of exceptions, which is in words and figures as follows, to wit:

24 In the United States court for the northern district of the Indian Territory, sitting at Muscogee, December term, 1897.

UNITED STATES)
vs.) No. 3875.
CYRUS A. BROWN, DEFENDANT.)

Be it remembered that at the previous term of this court—at the May term, 1897, thereof—the following proceedings, among others, were had in this case, viz:

On the 13th day of July, 1897, a jury was duly empaneled in this case and sworn, and the defendant, Cyrus A. Brown, was tried upon the charges contained in both counts of the indictment herein. Evidence for the prosecution and the defense were heard and concluded.

On the 17th day of July, 1897, after the evidence was concluded, the court charged the jury.

After the argument by counsel, the jury retired to consider their verdict, and afterwards, and on the same day, said jury returned into court the following verdict:

"We, the jury, find the defendant guilty of murder, as charged in the second count of the within indictment.

"J. E. NEWBERRY,
"*Foreman.*"

On the 20th day of July, 1897, the defendant files his motion to set aside the verdict and for a new trial, which motion, after argument by the counsel and consideration by the court, was, on the 10th day of September, 1897, sustained and a new trial granted to defendant.

25 In the United States court for the northern district of the Indian Territory, sitting at Muscogee, December term, 1897.

UNITED STATES)
vs.) No. 3875.
CYRUS A. BROWN, DEFENDANT.)

Be it remembered that at the present term of this court, viz, the 15th day of December, 1897, the defendant in the above-entitled action filed

his motion for a continuance and postponement of said case, which motion is as follows:

In the United States court for the northern district of the Indian Territory, sitting at Muscogee.

THE UNITED STATES)
vs.) No. 3875.
CYRUS A. BROWN, DEFENDANT.)

Comes now the defendant, Cyrus A. Brown, in the above-entitled action, and moves the court to postpone and continue said case until the next term of this court, and for grounds of this his amended motion for that purpose states:

That he has been indicted in the above-entitled action for the crime of murder, and he pleads not guilty to the crime charged in said indictment; that he asks such continuance on the account of the absence of the following-named witnesses, whose evidence is material to his defense, and without whose testimony he can not safely proceed to trial, viz, MacC. Johns, of Siloam Springs, Ark.; Ed Sweeny, of Chanute, Kansas; Sam Adair, whose residence is near Vian, Indian Territory, and John S. Brown, also living near Vian, Indian Territory.

That on the 20th day of November, 1897, he had subpœnas issued for said named witnesses MacC. Johns, Ed Sweeny, and Sam
26 Adair, and placed in the hands of the marshal of the northern district, I. T., for service, but that said witnesses have not yet arrived, and are not now present; that he expects to prove by said witnesses MacC. Johns and Ed Sweeny that they are well acquainted with the defendant, and know his reputation for being a peaceable, law-abiding, and respectable citizen in the communities in which he has lived in the last four years; that such reputation is good, and defendant is not a lawbreaker and addicted to the commission of crime; that he expects to prove by the said Sam Adair that he was acquainted with the said Johnson L. Morgan, who stood jointly indicted with this defendant, but who is now made a witness for the Government; that he was one of the guards who had the said Morgan in charge when arrested, after the body of Daniel Cutbert was found, and that he had a conversation with said Morgan in which the latter admitted to him that he knew of the sinking of the body of said Cutbert in the Arkansas River, and that he knew when it was done that it would float in a few days, because he knew of a similar case which had previously occurred and the body floated.

Defendant further states that he has been in jail for over a year past; that his immediate relatives live in the States of Kansas and are people of limited means, and on account of distance and such limited means have not been able to render him assistance in looking up and obtaining testimony on his behalf; that he has neither money or property, and has been unable to furnish his attorneys with any means to look up evidence in his defense, and he believes that such evidence exists and could be procured by investigation and attention; that in giving names of persons to his attorneys to be subpœnaed as witnesses to prove his good

character as a law-abiding citizen he has sought to select such
27 persons as would be practically convenient to the court as possible, and could give competent testimony in that respect; that he selected four such persons, who are men of good standing in the communities in which they live, and three were allowed, one of whom is present, viz, S. C. Minnick; that the other two witnesses asked and allowed, viz, MacC. Johns, is a farmer living on a farm about 2½ miles east and a half a mile south of Siloam Springs, Ark., and was living there in the spring 1896; that defendant was there at that time, and the said Johns was plowing, preparatory to putting in a crop at the time defendant left there; that the witness Ed Sweeny, asked as a witness to character, lived in Chanute, Kansas, which was his home, and where his parents and family resided, and that defendant saw him there in July, 1896; and defendant states that he was arrested on the charge in the indictment in October, 1896, and has never heard that the said Johns and Sweeny has ever removed from their respective homes.

That he expects to prove by John S. Brown that he arrested Johnson L. Morgan, and can prove by the actions, language, and demeanor of said Morgan, when arrested, his excited condition and refusal to make any statement. That said witness took a bottle of strychnine from said Morgan, which had belonged to the deceased, Daniel Cuthert, and can prove by him the conversation which he had with the defendant when brought in his presence, and that such conversation indicated a knowledge of the crime on the part of said Johnson L. Morgan. Defendant further states that he had a subpœna issued for said John S. Brown as soon as he learned that the former subpœna issued by the Government had not been served and was not insisted on by the prosecution, and he believes that he can procure his attendance in a few days, and also the attendance of said Sam Adair, MacC. Johns, and Ed Sweeny
28 by the next term of this court.

Defendant further states that he placed the subpœna allowed and obtained for the above-named witnesses in the hands of the marshal of the northern district of the Indian Territory on the 20th day of November, 1897, with the request that the subpœna for the witnesses outside of the Territory be forwarded to the respective marshals in the districts indicated by their several residences, for service, which he said he would do, as that is the usual course of practice in his office. That he is informed by the said marshal that the subpœna for the witness MacC. Johns has been returned and not served; that the subpœna for Sam Adair has not yet been returned, and the subpœna for Ed Sweeny has been returned as served on Nov. 26th, 1897.

Defendant further states that he has used due diligence to procure the attendance of his witnesses, and their testimony, at this term of court; that this application is not made for delay, but that justice may be done; that the above-named witnesses are not absent by reason of any collusion, procur'ment, or connivance on his part, or by anyone else on his behalf to his knowledge; that he sought to obtain his witnesses in good faith as above set forth; that he does not know of any other witnesses other than the above-mentioned Sam Adair and John S. Brown by whom he can so fully prove the facts which he expects to prove by them as above set forth; and that he does not know of any other witnesses as

to character than the said MacC. Johns and Ed Sweeny whose attendance he can procure at this term of court; but defendant states that he believes that he can procure the attendance of said witnesses at the next term of court, or if the witnesses as to character have removed from their homes since defendant's incarceration that he can procure
29 others in their stead by the next term of *of* this court. And defendant further states that he believes the facts set forth in the foregoing motion are true.

Wherefore he respectfully asks a continuance of this case.

CYRUS A. BROWN.

KOOGLER & WATKINS,
Attorneys for Defendant, Cyrus A. Brown.

Cyrus A. Brown, being duly sworn, says that he has read the foregoing motion for continuance, and he believes the allegations made therein are true.

CYRUS A. BROWN.

Subscribed and sworn to before me this 15th day of December, 1897.

JAS. A. WINSTON, *Clerk.*

Which said motion for a continuance was by the court, after due consideration, overruled; to the overruling of said motion the defendant then and there excepted.

30 That thereafter, on the 16th day of December, 1897, on the trial of this cause in the said court, at the said term, a jury was impaneled to try the issues in said cause, which jury was composed of the following-named persons, to wit:

1. Lewis Lyons.
2. J. W. Thompson.
3. Joseph Downing.
4. R. M. Bean.
5. J. W. Graham.
6. David Berryhill.
7. F. A. Mannering.
8. F. P. Wills.
9. W. J. McMakin, sr.
10. Charles Winfield.
11. Lewis Miller.
12. Ferdinand Farmer.

That thereupon the Government introduced evidence before the jury tending to prove the defendant guilty of the crime charged in the indictment, and, the case for the Government being closed, the defendant introduced evidence tending to establish his innocence.

After all the evidence, both for the prosecution and the defense, had been heard by the jury, the court charged the jury as follows:

31 Gentlemen of the jury, you will give attention to the charge of the court as to the law governing this case.

The defendant in this case stands charged by the indictment with the crime of murder.

Murder is defined by the law to be the unlawful and felonious killing of a human being, in the peace of the United States, with malice aforethought, either expressed or implied.

Express malice is that deliberate intention of the mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or where the killing manifests a wicked disposition.

The killing being proved, the burden of proving circumstances that justify or excuse the homicide devolves on the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide.

Murder may proven either by the evidence of witnesses who were present and witnessed the killing, or by circumstantial evidence; that is, by circumstances which, when taken together, form a perfect chain of evidence, and show beyond a reasonable doubt that the defendant, unlawfully and feloniously, and of his malice aforethought, took away the life of a person in the peace of the United States.

The burden of proving each and all of the material allegations in the indictment, beyond a reasonable doubt, rests upon the prosecution.

If you believe from the evidence, beyond a reasonable doubt, that the defendant, Cyrus A. Brown, within the northern district of the Indian Territory, unlawfully, wilfully, feloniously, and of his malice
32 aforethought killed Daniel Cutbert, as charged in the indictment, and that all the other material allegations in the indictment have been proven beyond a reasonable doubt, your verdict should be guilty.

The charity of the law and its solicitude for the safety of the innocent are such that a person accused of crime is presumed to be innocent until the contrary is shown by the evidence beyond a reasonable doubt, and this presumption of innocence is a proper element of defense in behalf of the defendant. The strength of the presumption of innocence is not overcome by mere preponderance of evidence, nor by any weight of preponderant evidence, but it stands as a shield of the accused until it is overthrown by evidence that satisfies your minds beyond a reasonable doubt that the defendant is guilty of the crime as charged in the indictment.

What is meant by circumstantial evidence in criminal cases is proof of such facts or circumstances surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. As a matter of law, where a conviction for a criminal offense is sought upon circumstantial evidence alone the Government must not only show by a preponderance of evidence that the facts and circumstances are true, but they must be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of any reasonable hypothesis other than the guilt of the accused. If the jury finds from the evidence that all the criminating circumstances of the case will as well apply to another person as to the defendant, or if, taken all together, they do not satisfy your minds beyond a reasonable doubt of the defendant's guilt, then you should acquit.

In all criminal cases, where the prosecution depends upon cir-
33 cumstantial evidence alone for conviction, and such evidence is not conclusive in its character, previous good character of the accused, if proven, may be considered by you in determining the question of his guilt or innocence.

Though the jury may believe from the evidence that the said Daniel Cutbert was murdered at the time and place charged in the indictment, and that the defendant Cyrus A. Brown was present at the time of such murder, still, if the jury is not satisfied beyo'd a reasonable doubt that the said Cyrus A. Brown murdered him, or was previously aware of the purpose of some other person to kill the said Cutbert, and that he in some way aided, abetted, or assisted in the killing, or advised and encouraged it, then you should find the said Cyrus A. Brown not guilty.

The jury has no right to disregard the testimony of the defendant on the ground alone that he is the defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proven guilty, and the jury should consider his testimony together with all the other circumstances of the case, and if from all the evidence the jury has any reasonable doubt as to the guilt of the defendant, you should give him the benefit of such doubt and acquit him; but in considering the testimony of the defendant you should take into consideration the fact that he is the defendant in the case, his great interest in the case, and the result of the trial, his appearance and manner of testifying while on the stand, whether or not he has made other and contradictory statements regarding the facts of the case (if the evidence shows that he has made other and contradictory statements), and taking all these circumstances into consideration, you should give to his testimony such weight and only such weight as you think it entitled to under all the circumstances of the case.

34 If the evidence fai;s to show any reasonable or sufficient motive for the commission of the crime charged upon the part of the accused that is a circumstance in favor of his innocence; and if the evidence fails to show any reasonable motive on the part of the accused to commit the crime charged against him that is a circumstance that the jury should consider, in connection with all the other evidence in the case, in making up your verdict.

Although the jury may believe that the deceased was killed in the manner charged in the indictment, but that the shot was fired by Johnson Morgan or Cyrus A. Brown, still, if the jury is not able to find from the evidence who fired the shot that killed the deceased, then you should consider it the same as if it had been proven that some person other than the defendant had fired the fatal shot.

If the jury should find from a consideration of the evidence that it points as strongly to Johnson L. Morgan as the person who committed the crime as it does to the defendant, or if the jury entertains a reasonable doubt as to whether the said Johnson L. Morgan or the defendant is the guilty party, then the jury should acquit.

The indictment is not to be taken as evidence. As the court has told you, the defendant is presumed to be innocent, and that presumption follows him through the case until it is either crystal'ized into a fact or overturned by such evidence as convinces your minds beyond a reasonable doubt that the defendant is guilty as charged. Although you may believe the defendant guilty, or most probably guilty, or have a strong suspicion of his guilt, you are not authorized under the law to convict unless all the circumstances in evidence before you convince your minds

beyond a reasonable doubt of the defendant's guilt. If there is such
35 conflict of testimony or lack of testimony as raises a doubt as to the defendant's guilt then it is your duty to resolve that doubt in favor of the defendant and acquit him. Still, the jury is not authorized to go in search of doubts, or to depend upon chimerical doubts which might arise in the mind of a man, but it must be based upon the evidence or a lack of evidence to make a reasonable doubt. A reasonable doubt is one growing out of the unsatisfactory or contradictory nature of the testimony, and is such that, after a consideration of all the facts in evidence before you, would cause an ordinarily prudent man, in considering the graver affairs of life, to hesitate and say, "I am not satisfied," and, as applied to this case, a reasonable doubt must be one growing out of the unsatisfactory or contradictory nature of the testimony, which, after consideration of all the testimony in the case, causes you to hesitate and say, "I am not satisfied of the guilt of the prisoner."

If you believe from the evidence that the defendant killed and murdered Daniel Cuthert, as charged in the indictment, then it is not material whether he was shot with a gun or a pistol, and in this case, there being two counts in the indictment, you may find him guilty under either the one or the other. Of course, you can not find him guilty on both counts, as there is but one crime charged.

You are the judges of the weight of the evidence and of the credibility of the witnesses, but in considering the testimony of the several witnesses it is your duty to take into consideration their appearance and manner while on the stand, their intelligence or lack of intelligence, their means of knowledge or lack of knowledge, as shown by their testimony, their interest or lack of interest, their feeling or prejudice—if any has been manifested—as to whether their story is reasonable or unreason-
36 able, as to whether they have made contradictory statements—if any such have been shown—and taking all these facts and circumstances into consideration you should give to the evidence of the respective witnesses such weight as you think it entitled to under all the circumstances of the case.

If you are satisfied that any witness has wilfully testified falsely with reference to any material matter, then and in that case, gentlemen, you are authorized to disregard the testimony of such witness in its entirety, unless the evidence of the witness has been corroborated by the unimpeached testimony of other credible witnesses, in which case you should give to his testimony such weight as you think it entitled to in connection with the corroborative evidence of the other witnesses.

In conclusion, the court instructs you that if, upon all the facts and circumstances proven in this case, you reach the conclusion that the defendant is guilty of the crime charged, it will be your duty to so find him, and if you find him guilty of murder you may qualify your verdict—if you conclude from all the circumstances of the case you should so decide—by adding thereto the words "without capital punishment." You must decide this case upon the law and the evidence before you, and you must decide this case fairly and impartially, without fear, favor, or affection. You must do your duty. If the defendant has not been proven guilty beyond a reasonable doubt, you should so find. If the defendant has been proven guilty beyond a reasonable doubt, as charged, you should so find.

If you believe from the evidence, beyond a reasonable doubt, that the defendant Brown was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert and knew of the
37 commission of the crime, and neither raised his voice nor gave information of the fact, at the time nor after its commission, or if you believe from the evidence that he, being present, aided, abetted, or assisted in the killing of Cutbert, or, not being present, had advised and counseled the killing of Cutbert, then, and in that case, gentlemen of the jury—if these facts have been proven beyond a reasonable doubt—whether he fired the gun or some one else fired, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it.

To the latter part of which charge the defendant then and there at the time excepted and still excepts.

38 The defendant also, when the evidence was closed, asked the court to direct a verdict of acquittal, which request was refused.

To which refusal of the court to so direct the jury defendant then and there at the time, and before the jury had retired from the bar of the court, excepted and still excepts.

That after argument by counsel, on the same day, viz, December 17th, 1897, the jury having retired to consider of their verdict, returned into court the following verdict:

"We, the jury, duly empaneled and sworn in the above-entitled cause, do find from the law and the evidence the said defendant, Cyrus A. Brown, guilty of murder, as charged in the first count of the within indictment."

JOHN W. GRAHAM,
Foreman.

To which verdict, and the form thereof, defendant then and there at the time excepted and still excepts.

39 That thereafter, on the 20th day of December, 1897, defendant his motion to set aside the verdict, and grant him a new trial, which motion is as follows, viz:

In the United States court for the northern district of the Indian Territory, sitting at Muscogee, December term, 1897.

UNITED STATES)
vs.) No. 3875. Murder.
CYRUS A. BROWN, DEFENDANT.)

Comes now the defendant, Cyrus A. Brown, in the above-entitled case, and states that his substantial rights have been prejudiced by the verdict rendered by the jury against him in said case, and moves the court to set aside the verdict and grant him a new trial in said case on the following grounds:

1st. Because the verdict is against the law.
2nd. Because the verdict is against the evidence.
3d. Because the verdict is against the law and the evidence.

4th. Because the court misinstructed the jury.

5th. Because the court refused to instruct the jury to return a verdict of acquittal.

6th. Because the defendant was previously tried before the jury upon the charge contained in the first count of the indictment at the May term of this court, and the jury in that case by their verdict, rendered on July 17th, 1897, impliedly acquitted the defendant of the crime charged in said first count, said case having been submitted to the jury on both the first and second counts.

That the verdict rendered on the previous trial was as follows:

"We, the jury, find the defendant, Cyrus A. Brown, guilty of murder, as charged in the second count of the within indictment.

J. W. NEWBERRY,
Foreman."

40 7th. Because the indictment in this case is an indictment for murder in the second degree, and it does not comform to and support the verdict rendered in the first degree.

8th. Because the court overruled defendant's motion for a postponement or continuance of the case on account of absent witnesses and evidence.

KOOGLER & WATKINS,
Attorneys for Defense.

Which motion, on the 24th day of December, 1897, after argument by counsel, was overruled by the court, to which ruling of the court defendant at the time then and there excepted and still excepts.

41 That thereupon, on the same day, viz, the 24th day of December, 1897, defendant filed his motion in arrest of judgment, which is as follows:

In the United States court for the northern district of the Indian Territory.

UNITED STATES
vs. } No. 3875.
CYRUS A. BROWN, DEFENDANT.

Comes now the defendant, Cyrus A. Brown, in the above-entitled action, and moves the court to arrest the judgement and sentence upon the verdict rendered in the case, because the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, and the indictment is for murder in the second degree, and is informal and insufficient.

Because the verdict does not conform to the indictment and is for an offense greater than charged.

Because the defendant could not legally be put upon trial on the first count of the indictment herein, as the defendant was tried upon said first count at the May term of this court, and to which offense as charged in said first count defendant plead not guilty, and the jury in said case,

having been duly empaneled and sworn to try the issues in that count, and after hearing the evidence adduced before them, and the case having been submitted to them by the court upon the first count of the indictment herein as well as upon second count of said indictment, they, by their verdict rendered in said trial, impliedly acquitted the defendant of the offense charged in said first count, and since said first trial defendant has never been arraigned or given opportunity to plead to said
42 first count, and defendant could not legally be again put in jeopardy of his life upon the offense charged in said first count.

KOOGLER & WATKINS,
Attorneys for Defendant, Cyrus A. Brown.

Which said motion in arrest of judgement was overruled by the court, to which ruling of the court defendant at the time then and there excepted and still excepts.

43 Whereupon the court rendered judgment on the verdict, and sentenced the defendant to death, as set forth in the record; to which action of the court in rendering such judgment and sentence on the verdict returned into court, defendant then and there excepted, and still excepts.

Whereupon, on the same day, the defendant was granted, by an entry made of record, sixty days in which to prepare and file his bill of exceptions.

And now, on this 20th day of January, A. D. 1898, within the time allowed by the order of the court, comes the defendant and presents to the Hon. John R. Thomas, judge of the United States courts of the Indian Territory, assigned to the northern district, before whom the foregoing proceedings were had, his bill of exceptions, and prays that it be allowed, signed, sealed, filed, and made a part of the record in the case; and it is accordingly done.

Given under my hand and seal as judge on the 20th day of January, A. D. 1898.

JOHN R. THOMAS,
Judge of the United States Courts of the Indian Territory.

(Endorsed as follows:) No. 3875; in the United States court, northern district; United States vs. Cyrus A. Brown; bill of exceptions; filed January 20th, 1898; Jas. A. Winston, clerk.

44 Thereafterwards, on the 1st day of February, A. D. 1898, the same being one of the regular days of the said December, 1897, term of said court, present, Hon. Wm. M. Springer, judge, among the proceedings had was the following, to wit:

THE UNITED STATES *vs.* — No. 3875. Indictment for murder.

On this day comes the defendant by his counsel, and files his petition for writ of error to the Supreme Court of the United States, and prayer for reversal of judgment, and also files his assignment of errors; which

writ of error, prayer for reversal of judgment, and assignment of errors are as follows, to wit:

In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

To the honorable Supreme Court of the United States of America:

Your petitioner, Cyrus A. Brown, appellant in the above-entitled case, herewith files this his petition, and prays that a writ of error may be granted him by the Supreme Court of the United States from the judgment and sentence rendered against him by the United States court for the northern district of the Indian Territory, and for grounds of his petition states:

That at the December term, 1897, of the United States court for the northern district of the Indian Territory, sitting at Muscogee, Hon. John R. Thomas, presiding judge, he was tried upon and indictment for the murder of Daniel Cutbert, and was convicted of said crime on the first count of said indictment, and on the 24th day of December, 1897, judgment was rendered against him, and he was sentenced to death by said court, and to be hung by the neck on the 25th day of February, 1898.

He further says that in the record and proceedings, as also in the rendition of the judgment and sentence against him by the said court, in said cause, manifest error hath happened to the great damage of this petitioner, and which error he specifies more particularly as follows:

Specifications of error.

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for his life upon the indictment in this case, as the said indictment was an indictment for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal, and not accessory before the fact, the court erred in giving the following instruction to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant Brown was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice, nor gave information of the fact, at the time, nor after its commission, or if you believe from the evidence that he being present, aided, abetted, or assisted in the killing of Cutbert, or not being present, had advised and counselled the killing of Cutbert, then, and in that case, gentlemen of the jury—if these

facts have been proven beyond a reasonable doubt—whether he
46 fired the gun or some one else fired it, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment; and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder, as defined by the laws applicable to this case; and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict, as returned by the jury, because the verdict does not find whether the defendant is guilty of murder in the first or second degree.

Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case; said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

47 Wherefore, appellant prays that he be granted a writ of error by the Supreme Court of the United States, directed to the aforesa'd United States court for the northern district of the Indian Territory, sitting in Muscogee, requiring it to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States; and said appellant, Cyrus A. Brown, also prays that the error above specified may be corrected, and the judgment and sentence, above *mentioned*, pronounced against him may be reversed and what of right, according to the laws and customs of the United States, should be done.

Petitioner also asks that a citation be issued to said appellee, the United States of America, and to the Hon. Pliny L. Soper, United States attorney for the northern district of the Indian Territory, to appear at the term of the Supreme Court of the United States, to be held at Washington, D. C., sixty days after date, to show cause why the error above mentioned should not be corrected.

JOHN H. KOOGLER.
JOHN WATKINS.
KOOGLER & WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

Endorsed as follows:

United States Supreme Court. Cyrus A. Brown, appellant, versus The United States, appellee. Petition for writ of error and prayer for reversal of judgment. Filed in open court Feb. 1, 1898. Jas. A. Winston, clerk.

48 *Assignment of errors.*

In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

Appealed for the northern district of the Indian Territory.

Specifications of error.

Cyrus A. Brown, the appellant in the above case, respectfully shows to the court that in the record and proceedings in this case there is manifest error in this:

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for his life upon the indictment in this case, as the said indictment was an indictment for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal and not accessory before the fact, the court erred in giving the following instruction to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, Brown, was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice nor gave information of the fact, at the time nor after its commission, or if you believe from the evidence that he, being present, aided, abetted, or assisted in the killing of Cutbert, or, not being present, had advised and counseled the killing of Cutbert, then, and in that case, gentle-
49 men of the jury, if these facts have been proven beyond a reasonable doubt, whether he fired the gun or some one else fired it, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment, and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder as defined by the law applicable to this case, and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict as returned by the jury, because the verdict does not find whether the defendant was guilty of murder in the first or second degree.

Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case; said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

Wherefore, defendant prays that said error may be corrected and
56 what of right and according to the law and customs of the United States should be done and that the judgment and sentence rendered against him be reversed and the case remanded.

JOHN H. KOOGLER,
JOHN WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

Endorsed as follows:

United States Supreme Court. Cyrus A. Brown, appellant, versus The United States, appellee. Assignment of errors. Filed in open court Feb. 1, 1898. Jas. A. Winston, clerk.

51 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States court in the Indian Territory, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States court before you, or some of you, between The United States, plaintiff, and Cyrus A. Brown, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

52 On this sixteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared John R. Thomas before me, the subscriber, James A. Winston, clerk of the United States court in and for the northern district of the Indian Territory, and makes oath that he received a true copy of the within writ of error to the United States court in the Indian Territory, and that he is the identical John R. Thomas, judge of the United States courts in the Indian Territory, before whom the case of The United States vs. Cyrus A. Brown was tried and the defendant convicted of the crime of murder.

JOHN R. THOMAS,
Judge U. S. Courts, Indian Territory.

Sworn to and subscribed the 16th day of February, A. D. 1898.

[SEAL.] JAS. A. WINSTON,
Clerk U. S. Court in the Northern Dist., Ind. Ter.
By J. C. ANDERSON,
Deputy Clerk.

I hereby acknowledge service of a copy of the within writ this 16th day of Feb'y, 1898.

P. L. SOPER,
U. S. Attorney, Northern District of Ind. Ter.

53 UNITED STATES OF AMERICA, *ss:*

To the United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States court in the Indian Territory, wherein Cyrus A. Brown is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 8th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

54 On this sixteenth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared John R. Thomas before me, the subscriber, James A. Winston, clerk of

the United States court in and for the northern dist. of the Indian Territory, and makes oath that he received a true copy of the within citation to the United States court in the Indian Territory, and that he is the identical John R. Thomas, judge of the U. S. courts in the Indian Territory before whom the case of The United States vs. Cyrus A. Brown was tried and the defendant convicted of the crime of murder.

Sworn to and subscribed the 16th day of February, A. D. 1897.

JOHN R. THOMAS,
Judge U. S. Courts in the Ind'n Ter.

[SEAL.] JAS. A. WINSTON, *Clerk*,
By J. C. ANDERSON, *D. C.*

I hereby acknowledge service of a copy of the within writ this 16th day of Feb'y, 1898.

P. L. SOPER,
United States Attorney, Northern District of Indian Territory.

55 UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

I, James A. Winston, clerk of the United States court for the northern district of the Indian Territory, do hereby certify that the within and foregoing transcript is a full, true, and correct transcript of the record and proceedings, and all things as far as called for concerning the criminal cause numbered 3875, and entitled The United States, plaintiff, and Cyrus A. Brown, defendant, as the same appears from the records and files at my office at Muskogee, Indian Territory.

Witness my hand and the seal of said court on this the 16th day of February, A. D. 1898.

[SEAL.] JAMES A. WINSTON, *Clerk*,
By N. S. YOUNG, *Deputy Clerk.*

56 In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,)
vs.
UNITED STATES OF AMERICA, APPELLEE.)

To the honorable Supreme Court of the United States of America:

Your petitioner, Cyrus A. Brown, appellant in the above-entitled case, herewith files this his petition, and prays that a writ of error may be granted him by the Supreme Court of the United States from the judgment and sentence rendered against him by the United States court for the northern district of the Indian Territory, and for grounds of his petition states:

That at the December term, 1897, of the United States court for the northern district of the Indian Territory, sitting at Muscogee, Hon. John R. Thomas presiding judge, he was tried upon an indictment for the murder of Daniel Cutbert, and was convicted of said crime on the first count of said indictment, and on the 24th day of December, 1897, judgment was rendered against him and he was sentenced to death by said court and to be hung by the neck on the 25th day of February, 1898.

He further says that in the record and proceedings, as also in the rendition of the judgment and sentence against him by the said court in said cause, manifest error hath happened to the great damage of this petitioner, and which error he specifies more particularly, as follows:

Specifications of error.

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for
57 his life upon the indictment in this case, as the said indictment was an indictment for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal, and not accessory before the fact, the court erred in giving the following instruction to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, Brown, was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice nor gave information of the fact, at the time nor after its commission, or if you believe from the evidence that he being present aided, abetted, or assisted in the killing of Cutbert, or not being present had advised and counselled the killing of Cutbert, then, and in that case, gentlemen of the jury—if these facts have been proven beyond a reasonable doubt—whether he fired the gun or some one else fired it, he would be guilty. I say if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then and in that case you should find him guilty, whether he fired the shot or some one else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment; and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder, as defined by the laws applicable to this case; and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict as returned by the jury, because the verdict does not find whether the defendant is guilty of murder in the first or second degree.

58 Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case, said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

Wherefore appellant prays that he be granted a writ of error by the Supreme Court of the United States, directed to the aforesaid United States court for the northern district of the Indian Territory, sitting at Muscogee, requiring it to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States; and said appellant, Cyrus A. Brown, also prays that the error above specified may be corrected and the judgment and sentence above mentioned pronounced against him may be reversed, and what of right, according to the laws and customs of the United States, should be done.

Petitioner also asks that a citation be issued to said appellee, The United States of America, and to Hon. Pliny L. Soper, United States attorney for the northern district of the Indian Territory, to appear at the term of the Supreme Court of the United States, to be held at Washington, D. C., sixty days after date to show cause why the error above mentioned should not be corrected.

JOHN H. KOOGLER.
JOHN WATKINS.
KUGLER & WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

59 (Indorsed on back:) Case No. 16808. Supreme Court U. S. October term, 1897. Term No., 595. Cyrus A. Brown, P. E., *vs.* The United States. Petition for writ of error & prayer for reversal. Office Supreme Court U. S. Filed Feb. 23, 1898. James H. McKenney, clerk.

60 In the Supreme Court of the United States of America.

CYRUS A. BROWN, APPELLANT,
vs.
UNITED STATES OF AMERICA, APPELLEE.

Appealed for the northern district of the Indian Territory.

Specifications of error.

Cyrus A. Brown, the appellant in the above case, respectfully shows to the court that in the record and proceedings in this case there is manifest error in this:

First. Because the verdict returned by the jury is against and contrary to the law.

Second. Because the verdict of the jury is against and contrary to the evidence.

Third. Because the verdict of the jury is against and contrary to the law and the evidence.

Fourth. The court erred in putting the defendant on trial for his life upon the indictment in this case, as the said indictment was an indictment

for murder in the second degree under the laws applicable to this case, as adopted from Mansfield's Digest of the Statutes of Arkansas, and the procedure thereunder.

Fifth. As the defendant was charged in the indictment as principal and not accessory before the fact, the court erred in giving the following instructions to the jury:

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, Brown, was present at the time of the killing of Cutbert, and if you believe that he had previously thereto entered into a conspiracy with Johnson Morgan to kill and murder Cutbert, and knew of the commission of the crime, and neither raised his voice nor gave information of the fact at the time nor after its commission; or if you believe from the evidence that he, being present, aided, abetted, or assisted in the killing of Cutbert, or, not being present, had advised and counseled the killing of Cutbert, then, and in that case, gentlemen of the jury, if these facts have been proven beyond a reasonable doubt, whether he fired the
61 gun or someone else fired it, then he would be guilty. I say, if he was there aiding, abetting, or assisting, or if he was there ready, in conformity with an agreement previously entered into, to assist in case it was found necessary, then, and in that case, you should find him guilty, whether he fired the shot or someone else fired it."

Sixth. The court erred in submitting the case to the jury on both counts of the indictment; and erred in refusing to instruct the jury to return a verdict of acquittal, particularly as to the first count of the indictment, because the defendant had previously been tried on both counts of the indictment, and was impliedly acquitted on the first count thereof.

Seventh. The court erred in not instructing the jury as to the degree of murder, as defined by the laws applicable to this case; and the verdict of the jury was incomplete in not specifying whether the jury found the defendant guilty of murder in the first or second degree.

Eighth. The court erred in rendering judgment and sentence on the verdict, as returned by the jury, because the verdict does not find whether the defendant was guilty of murder in the first or second degree.

Ninth. The court erred in sentencing the defendant to death upon the charge contained in the indictment in this case; said indictment being only for murder in the second degree.

Tenth. The court erred in overruling defendant's motion for continuance.

Eleventh. The court erred in not sustaining defendant's motion for a new trial.

Twelfth. The court erred in not sustaining defendant's motion in arrest of judgment.

Wherefore defendant prays that said error may be corrected and what of right and according to the laws and customs of the United States should be done; and the judgmeat and sentence rendered against him be reversed and the case remanded.

JOHN H. KOOGLER, and
JOHN WATKINS,
Attorneys for Appellant, Cyrus A. Brown.

62 (Indorsed on back:) Case No. 16808. Supreme Court U. S., October term, 1897. Term No., 595. Cyrus A. Brown, P. E., *vs.* The United States. Assignment of errors. Office Supreme Court U. S. Filed Feb. 23, 1898. James H. McKenney, clerk.

(Indorsement on cover:) Case No. 16808. Term No., 595. Cyrus A. Brown, plaintiff in error, *vs.* The United States. Indian Territory, U. S. court. Filed February 23d, 1898.